SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 95

CATHERINE LLEWELLYN VAN WART, BY ROY M. VAN WART, NATURAL TUTOR, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1934.

—5490-C.

[fols. ½ & a–1] [Caption omitted]

[fol. 2]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 43967

MISS CATHERINE LLEWELLYN VAN WART, by Roy M. Van Wart, Natural Tutor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Thos. A. Dubourg, Esq., Frederick R. Gibbs, Esq.

For Comm'r.: J. E. Marshall, Esq.

DOCKET ENTRIES

1929

Apr. 29. Petition received and filed. Taxpayer notified. (Fee paid.)

Apr. 30. Copy of petition served on General Counsel.

Jun. 14. Answer filed by General Counsel.

Jun. 17. Copy served on taxpayer. General Calendar.

1931

Jan. 27. Notice of appearance of Frederick R. Gibbs as counsel for taxpayer filed.

Jan. 27. Motion to transfer to the Reserve Calendar filed by taxpayer. 1/28/31 granted to Reserve A.

1932

Jul. 29. Hearing set November 14, 1932.

Nov. 7. Stipulation of facts filed.

Nov. 14. Hearing had before Mr. Sternhagen, Div. 10, called on merits. Submitted—no briefs.

[fol. 3]

Nov. 30. Transcript of hearing Nov. 14, 1932 filed.

Dec. 5. Memorandum opinion rendered, Mr. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

1933
Jan. 6. Consent to settlement filed by taxpayer (void).
Jan. 11. Notice of settlement filed by General Counsel.
Jan. 16. Hearing set Feb. 8, 1933 on settlement.
Jan. 23. Consent to settlement filed by taxpayer.
Jan. 28. Judgment entered, Mr. Sternhagen, Div. 10.
Apr. 19. Petition for review by U. S. Circuit Court of Appeals (5) with assignments of error filed by General Counsel.
Apr. 20. Proof of service filed by General Counsel.
May 2. Præcipe with proof of service thereon filed.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed Apr. 29, 1929

The above-named petitioner hereby petitions for a re determination of the deficiency set forth by the Commis- [fol. 4] sioner of Internal Revenue in his notice of deficiency (symbols IT:AR:B-1-FMA-60D), dated March 6, 1929, and as a basis of her proceeding alleges as follows:

I

The petitioner is an individual, a minor, residing in New Orleans, Louisiana, at 4216 General Taylor Street. Petitioner's father, Roy M. Van Wart, is her natural tutor under the laws of the State of Louisiana, and as such represents her herein.

II

The notice of deficiency (a copy of which is attached hereto marked Exhibit A) was mailed to the petitioner on March 6, 1929.

III

The taxes in controversy are income taxes for the calendar year 1924 in the amount of One Hundred Four Thousand Five Hundred Fifty and 59/100 Dollars ($104,550.59).

IV

The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. Increase of $2,457.32 in "other income from Estate of Jenkins Jones";

2. Inclusion in taxable income of $159,094.16 received during the year 1924 from Estate of Jenkins Jones under a decree of the United States Circuit Court of Appeals for the Fourth Circuit;

3. Increase of $77,556.36 in dividends reported by petitioner;

[fol. 5] 4. Disallowance of $30.23 taxes paid;

5. Disallowance of attorney's fees amounting to $30,000.00; and

6. Disallowance of loss of $767.69 on operation of Orange Grove, Lakeland, Florida.

V

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

1. (a) The petitioner is sole beneficiary of the Trust Estate of Catherine Van Wart, created by the will of Jenkin Jones, deceased, and forming a part of the Estate of Jenkin Jones deceased.

(b) The trustee of the Trust Estate of Catherine Van Wart filed a fiduciary return for the calendar year 1924 showing net income distributable to the petitioner from the said trust estate as follows:

Dividends	$77,556.36
Other Income	2,685.32
Total	$80,241.68

(c) The item "Other Incomes" consisted of the following:

Interest on corporation bonds		$ 228.00
Interest on United States Treasury Certificates		3,255.24
Total		$3,483.24
Less: Taxes paid	$ 30.23	
Loss on operation of Orange Grove at Lakeland, Fla.	767.69	797.92
Net amount of other income		$2,685.32

[fol. 6] (d) The petitioner reported the item of "other income" amounting to $2,685.32 in her return for the year 1924, as follows:

Line 4, Income from fiduciary (Interest on Corporation Bonds)		$ 228.00
Line 8, Interest on U. S. Treasury Certificates	$3,255.24	
Less exempt	75.00	3,180.24
Total		$3,408.24
Line 12, Taxes Paid	$ 30.23	
Line 16, Loss on operation of Orange Grove, Lakeland, Fla.	767.69	797.92
Net amount reported as income from Estate of Jenkin Jones		$2,685.32

(e). The respondent added $2,457.32 to the amount of $228.00 reported on line 4 of the return, so as to bring the income shown on that line to $2,685.32, the amount of "Other Income" reported by fiduciary.

2. (a) The petitioner's grandfather, Jenkin Jones, by a will dated August 24, 1915, and presented for probate December 26, 1916, directed that a portion of his estate be held in trust and the income theerfrom paid over to his daughter, May Llewellyn Van Wart, as promptly as possible after collection, during her life and that at her death, or if his daughter should predecease him, then at his death, such share of the estate should immediately vest in and become the property of his daughter's children or their lineal descendants, with the provision that his executors should hold in trust the shares of any of the children or [fol. 7] lineal descendants of his daughter who were living at the time of her death and were not at that time twenty-one years of age until such child or lineal descendant should have attained the age of twenty-one years, at which time or times, respectively, the share of each and every child or lineal descendant should be paid over to him and become his sole, separate, and absolute property.

(b) The daughter, May Llewellyn Van Wart, survived the testator and thereafter died, leaving as her only issue a daughter, the petitioner herein, who had not attained the

age of twenty-one years. The trustee held the petitioner's share of the estate of Jenkin Jones in trust, under the terms of the will, and interpreted the will as directing him to accumulate the income of said trust instead of distributing it currently to the petitioner.

(c) The petitioner, acting through her father, who had been confirmed as her natural tutor under the laws of the State of Louisiana, brought suit to compel the trustee to distribute the income to her, and on January 11, 1924, the United States Circuit Court of Appeals for the Fourth Circuit rendered a decision (295 Feb. 287) holding that the will did not authorize the trustee to accumulate the income, and that the income of the trust should have been distributed currently to the petitioner.

(d) Thereafter, pursuant to the said decision of the Circuit Court of Appeals, the trustee paid over to the petitioner, during the year 1924, $159,094.16 of income accumulated during years prior to 1924.

(e) The petitioner did not report the amount of $159,094.16 as taxable income for the year 1924.

[fol. 8] (f) The respondent has added the amount of $159,094.16 to petitioner's taxable income for the year 1924.

3. (a) The fiduciary return filed by the Trustee of the Trust Estate of Catherine Llewellyn Van Wart under the will of Jenkin Jones shows the petitioner's share of dividends received by the said estate as $77,556.36. (See item 1 (b) herein.)

(b) The petitioner reported the said $77,556.36 of dividends, this amount being included in the item of $81,805.66, reported on line 7 of petitioner's return for the year 1924.

(c) The respondent has added the amount of $77,556.36 to the dividends reported by the petitioner.

4. (a) The Trust Estate of Catherine Llewellyn Van Wart paid taxes amounting to $30.23 during the year 1924, which were reported as a deduction in the fiduciary return filed by the trustee.

(b) In her income tax return, the petitioner reported the entire gross income collected by the Trust Estate, as explained in item 1 (d) herein, and claimed a deduction for the taxes paid, amounting to $30.23.

(c) The respondent disallowed the deduction.

5. (a) In order to compel the trustees of the Estate of Jenkin Jones to distribute to petitioner the income from said estate to which the petitioner was entitled under her grandfather's will, it was necessary to bring suit against the said trustees, which was done through petitioner's natural Tutor, Roy M. Van Wart, her father.

[fol. 9] (b) In connection with this suit, a fee of $30,000.00 was paid to petitioner's attorneys.

(c) The said fee was a business expense necessarily incurred to obtain possession of petitioner's income accumulated in prior years.

(d) The petitioner deducted such fees as a business expense in her return for the year 1924. The respondent has disallowed the deduction.

6. (a) In the fiduciary return filed by the trustee of the Trust Estate, a loss of $767.69 from operation of Orange Grove, Lakeland, Fla. was reported.

(b) The petitioner, having reported all gross income from the trust estate in her return for the year 1924, as explained in item 1 (d) herein, claimed a deduction on line 16 of her return for the said loss of $767.69 from operation of said Orange Grove.

(c) The respondent has disallowed the deduction of $767.69.

Wherefore, the petitioner prays that this Board may hear the proceeding and disallow the deficiency asserted by the respondent.

Thos. A. Dubourg, 1307 Pere Marquette Bldg., New Orleans, Louisiana, Counsel for Petitioner.

[fol. 10] *Duly sworn to by Roy M. Van Wart. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" TO PETITION

Copy

Treasury Department, Washington

Office of Commissioner of Internal Revenue

March 6, 1929.

Miss Catherine Llewellyn Van Wart, c/o Roy M. Van Wart, Guardian, 727 First National Bank Bldg., San Diego, California.

MADAM: In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1924 discloses a deficiency of $104,550.59, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days [fol. 12] after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully, D. H. Blair, Commissioner, by (S.) C. B. Allen, Deputy Commissioner.

Enclosures: Statement. Form 866. Form 882.

Statement

IT:AR:B-1.
FMA-60D

March 6, 1929.

In re/Mrs. Catherine Llewellyn Van Wart, c/o Roy M. Van Wart, Guardian, 727 First National Bank Bldg., San Diego, California.

Year.	Corrected Tax. Liability	Tax Previously Assessed.	Deficiency.
1924	$107,580.84	$3,030.25	$104,550.59

The report of the Internal Revenue Agent in Charge at San Francisco, California, covering the verification of your income tax return for the year 1924, has been reviewed and approved by this office with the exceptions indicated hereinafter.

[fol. 13] 1924

Net income disclosed by return		$47,119.76
Add:		
1. Other income from Estate of Jenkins Jones	$2,457.32	
2. Income from Estate of Jenkins Jones	159,094.16	
3. Dividends received through Estate of Jenkins Jones	77,556.36	
4. Taxes disallowed	125.23	
5. Attorney fees disallowed	30,000.00	
6. Capital loss sustained by Estate of Jenkins Jones	767.69	270,000.76
		$317,120.52
Deduct:		
7. Liberty Bond interest exempt		137.50
Adjusted net income		$316,983.02
Less:		
Dividends	$159,362.02	
Liberty Bond interest	3,042.74	
Personal exemption	1,000.00	163,404.76
Income subject to normal tax		$153,578.26

Computation of Tax

Normal tax at 2% on $4,000.00		$80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on $145,578.26		8,734.70
Surtax on $316,983.02		98,643.38
Total tax		$107,618.08
[fol. 14] Less:		
Tax paid at source	$17.24	
Earned income credit	20.00	37.24
Tax liability stated on Form 866		$107,580.84
Tax previously assessed		3,030.25
Proposed deficiency		$104,550.59

Explanation of Changes

1. Form 1041 filed by the Estate of Jenkin Jones for the year 1924 discloses other income distributed to you in the amount of $2,685.32. Since you have reported $228.00 from this source, the difference of $2,457.32 has been added to the gross income in accordance with Articles 341 and 342 of Regulations 65, relating to the Revenue Act of 1924.

2. This item represents income of the Estate of Jenkin Jones accumulated to March 14, 1924 and paid to you during the year 1924 in accordance with a court decree. This adjustment is in accordance with Articles 341 and 342 of Regulations 65.

3. Form 1041 filed by the Estate of Jenkin Jones for the year 1924, discloses dividends of $77,556.36 distributed to you which do not appear to have been reported in your return for 1924. This amount has therefore been included in the gross income in accordance with Articles 341 and 342 of Regulations 65.

4. Taxes of $95.00 paid on a new automobile purchased by you are not an allowable deduction from your gross income for the reason that such taxes are assessed against the automobile manufacturer. The amount of these taxes should therefore be added to the cost of the automobile [fol. 15] purchased by you. Taxes of $30.23 have been dis-

allowed for the reason that they were allowed as a deduction with the Estate of Jenkin Jones.

5. This item has been disallowed for the reason that it is held to constitute a charge against the corpus of the Estate of Jenkin Jones.

6. This item represents a loss sustained from the sale of the capital assets of the Estate of Jenkin Jones and is therefore disallowed as a deduction from your gross income in accordance with the provisions of Treasury Decision 3668, reported in Internal Revenue Cumulative Bulletin, IV-1, Page 191.

7. This item represents exempt interest.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1924, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3867 to discuss your case before mailing formal notice of its determination, as provided by Section 274(a) of the Revenue Act of 1926. It is therefore necessary at this time in order to protect the interests of the Government, to issue this formal notice of deficiency.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[fol. 16] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed June 14, 1929

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition herein, admits and denies as follows:

I

Admits the allegations of paragraph I of the petition.

II

Admits the allegations of paragraph II of the petition.

III

Admits the allegations of paragraph III of the petition.

IV

(1) Admits that the Commissioner erred as alleged in subparagraph (1) of paragraph numbered IV of the petition in that he increased petitioner's income by $2,382.32.

[fol. 17] (2) Denies error as alleged in subparagraph (2) of paragraph numbered IV of the petition.

(3) Denies error as alleged in subparagraph (3) of paragraph numbered IV of the petition.

(4) Admits error in disallowing $30.23 as alleged in subparagraph (4) of paragraph numbered IV of the petition.

(5) Denies error as alleged in subparagraph (5) of paragraph numbered IV of the petition.

(6) Denies error as alleged in subparagraph (6) of paragraph numbered IV of the petition.

V

1. (a) As to subparagraph (1)-(a) of paragraph numbered V of the petition the respondent is without knowledge and hence denies the same.

(b-c) Admits subparagraphs (1)-(b) and (1)-(c) of paragraph of the petition numbered V.

(d) As to subparagraph (1)-(d) of paragraph of the petition numbered V the respondent is without knowledge concerning the item of $75.00 alleged as exempt from income, and hence denies that such item represents exempt income, but admits the remaining allegations of said subparagraph.

(e) Admits the allegations of subparagraph (1)-(e) of paragraph of the petition numbered V.

2. (a-b-c) As to subparagraphs (2)-(a), (b) and (c) of [fol. 18] paragraph of the petition numbered V, respondent is without knowledge and hence denies the same.

(d-e-f) Admits the allegations of subparagraphs (2)-(d), (e) and (f) of paragraph of the petition numbered V.

3. (a) Admits the allegations of subparagraph (3)-(a) of paragraph of the petition numbered V.

(b) Denies the allegations of subparagraph (3)-(b) of paragraph of the petition numbered V.

(c) Admits the allegations of subparagraph (3)-(c) of paragraph of the petition numbered V.

4. (a-b-c) Admits the allegations of subparagraphs 4 (a), (b) and (c) of paragraph of the petition numbered V.

5. (a-b-c) Denies subparagraphs 5 (a), (b) and (c) of paragraph of the petition numbered V.

(d) Admits that petitioner deducted said attorney's fee and respondent disallowed said fee, but denies all other allegations of subparagraph 5 (d) of paragraph of the petition numbered V.

6. (a) Admits the allegations of subparagraph 6 (a) of paragraph of the petition numbered V.

(b) Admits that petitioner claimed a deduction of $767.69 from operation of an orange grove on her 1924 return, and denies the remaining allegations of subparagraph 6 (b) of paragraph of the petition numbered V.

[fol. 19] (c) Denies the allegations of subparagraph 6 (c) of paragraph of the petition numbered V.

Denies each and every allegation of fact contained in said petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be affirmed.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: Brooks Fullerton, Special Attorney, Bureau of Internal Revenue.

6/14/29.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Received Nov. 7, 1932. Filed Nov. 7, 1932

It is hereby stipulated and agreed by and between the parties to the above-styled proceeding, by their respective counsel of record, as follows:

[fol. 20] (1) In a suit in equity instituted in the District Court of the United States for the Southern District of West Virginia by Catherine Llewellyn Van Wart, an infant, by her next friend, Roy McLean Van Wart, against James Ellwood Jones and Isaac T. Mann, executors and trustees under the Will of Jenkins Jones, deceased, a decree was entered for defendants. Upon appeal, the Circuit Court of Appeals for the Fourth Circuit reversed the District Court. The facts set forth in the decision of the Circuit Court of Appeals, reported at 295 Fed. 287, are hereby adopted and by reference made a part hereof.

(2) Pursuant to the decision of the Circuit Court of Appeals, the trustees paid over to the guardian all income then accumulated under the trust and thereafter paid over the income from the trust as it accumulated yearly.

(3) The law firm of Reynolds & Reynolds, of Princeton, West Virginia, conducted the litigation in behalf of petitioner, appearing by her next friend, Roy McLean Van Wart; and by authority of the Court, they were paid a fee of $30,000.00 on April 11, 1924 for their services.

(4) In the return filed in behalf of petitioner by Roy McLean Van Wart for the year 1924, the sum of $30,000.00 was set up and claimed as a deduction against gross income on account of the fee paid to Reynolds & Reynolds. Upon audit, the respondent disallowed the deduction.

(5) In the deficiency notice, the respondent added the following items to the net income as disclosed by the return filed in behalf of the petitioner for 1924:

[fol. 21] 1. Other income from Estate of Jones ..... $ 2,457.32

2. Income from Estate of Jenkins Jones	159,094.16
3. Dividends received through Estate of Jenkins Jones	77,556.36
4. Taxes disallowed	125.23
5. Attorney fees disallowed	30,000.00
6. Capital loss sustained by Estate of Jenkins Jones	767.69

(6) It is agreed that respondent erroneously added items 1, 2, 3, 4 and 6 to the net income as disclosed by the return filed in behalf of petitioner for 1924.

(Sgd.) Frederick R. Gibbs, Counsel for Petitioner.
(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for Respondent.
JEM/cal 11/3/32.

BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 43967

CATHERINE LLEWELYN VAN WART, by Roy M. Van Wart, Natural Tutor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Frederick R. Gibbs, Esq., for the petitioner.
John E. Marshall, Esq., for the respondent.

MEMORANDUM OPINION

STERNHAGEN:

The petitioner is a minor, and a beneficiary under the will of Jenkins Jones, deceased. By her guardian, she instituted a proceeding against the executors of said decedent's estate to require an immediate distribution to her of accumulated income. A decision adverse to her in the District Court was reversed by the Circuit Court of Ap- [fol. 22] peals, and the litigation thus ended in her favor. For the services of her attorneys in this litigation, she paid a fee of $30,000 in 1924. In the income tax return filed in her behalf by her guardian, a deduction was taken of this amount, and the respondent, upon audit, disallowed the de-

duction. Several other adjustments by the respondent brought about the determination of a deficiency in petitioner's income tax for 1924 of $104,550.59. The parties have settled all matters in controversy except the deductibility of the item of $30,000, which alone remains for decision.

The petitioner relies upon Commissioner v. Wurts-Dundas, 54 Fed. (2d) 515, affirming 17 B. T. A. 881, as deciding exactly the same question, and respondent admits a substantial similarity. We think the two cases are sufficiently alike to require similar decisions. Therefore, without reconsidering the merits of the argument, the determination of the respondent that the attorney fee of $30,000 is not deductible is reversed.

Judgment will be entered under Rule 50.

Entered Dec. 5, 1932.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 43967

CATHERINE LLEWELYN VAN WART, by Roy M. Van Wart, Natural Tutor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JUDGMENT

Subsequent to the Board's Memorandum Opinion, entered December 5, 1932, the respondent filed a proposed [fol. 23] judgment which the petitioner agrees in writing is in conformity with the said Memorandum Opinion. In accordance therewith, it is

Ordered, adjudged and decided that there is an overpayment of income tax for 1924 of $10.33.

(Signed) John M. Sternhagen, Member. (Seal.)

Entered Jan. 28, 1933.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed April 19, 1933

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes David Burnet, Commissioner of Internal Revenue, by his attorney, Sewall Key, Special Assistant to the Attorney General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and J. E. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

[fol. 24]

I

The petitioner on review (hereinafter referred to as the Commissioner), is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the United States. The respondent on review (hereinafter referred to as the taxpayer), is a minor, residing in New Orleans, Louisiana, and a beneficiary under the Will of Jenkins Jones, deceased. The taxpayer's father, Roy McLean Van Wart, is her natural tutor and guardian under the laws of the State of Louisiana, and was duly qualified and acting in that capacity in the year 1924. Both the taxpayer and her father are citizens and actual residents of the State of Louisiana and the same was true in the calendar year 1924. The Federal individual income tax return of taxpayer for the calendar year 1924, being the taxable year involved herein, was filed on her behalf by her guardian and tutor, pursuant to the statute in such cases made and provided, with the Collector of Internal Revenue for the District of Louisiana, and the office of said Collector is located within the judicial circuit of the United States Circuit Court of Appeals for the Fifth Circuit.

II

The nature of the controversy is as follows, to-wit:

The taxpayer filed a petition with the United States Board of Tax Appeals on April 29, 1929, in pursuance

of the provisions of the Revenue Acts of 1926 and 1928, requesting the redetermination of a deficiency in income and surtaxes for the calendar year 1924, amounting to $104,550.59, as shown by the final notice of deficiency dated March 6, 1929, which was answered by the Commissioner on June 14, 1929.

[fol. 25] The United States Board of Tax Appeals promulgated a memorandum opinion on December 6, 1932, which was adverse to the Commissioner of Internal Revenue on the issue hereinbelow presented. The Board's order for judgment under its decision was entered on January 28, 1933.

The only issue submitted in this petition for review is: Whether the taxpayer is entitled to a deduction under the provisions of Section 214(a)(1) of the Revenue Act of 1924 against gross income of $30,000.00, representing a fee paid to attorneys for conducting litigation to determine if trust income, under the terms of a will, should be distributed or accumulated.

Taxpayer, who is a minor and a beneficiary under the will of Jenkins Jones, deceased, instituted a proceeding by her next friend, Roy McLean Van Wart, against the executors of said decedent's estate to require an immediate distribution to her of accumulated income. A decision adverse to her in the District Court of the United States for the Southern District of West Virginia was reversed by the United States Circuit Court of Appeals for the Fourth Circuit (295 Fed. 287), and the litigation thus ended in her favor. For the services of her attorneys in this litigation, taxpayer paid a fee of $30,000.00 in 1924. In the income tax return for 1924 filed in her behalf by her guardian, a deduction was taken of this amount, and the Commissioner, upon audit, disallowed the deduction. The Board decided the case upon the authority of Commissioner v. Wurts-Dundas, Central Union Trust Co. of New York, Guardian (C. C. A. 2d), 54 F. (2d) 515, affirming the Board of Tax Appeals (17 B. T. A. 881). That case presented a similar question which was decided adversely to the Commissioner by the Board of Tax Appeals [fol. 26] and the Board's decision was affirmed by the Circuit Court of Appeals for the Second Circuit.

Section 219(b) of the Revenue Act of 1924, so far as here material, provides that the fiduciary shall file the

return and that the net income of "the estate or trust" shall be computed in the same manner as that of an individual. By Section 212 of the same Act, the net income of an individual is made the gross income under Section 213 less deductions allowed by Section 214. Section 214(a)(1) of the same Act provides that there shall be allowed to individuals as deductions "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Taxpayer was not engaged in any trade or business. She was a beneficiary under a will. To establish her right to an immediate distribution to her of accumulated income as such beneficiary, she litigated the matter and paid a fee of $30,000.00 to her attorneys.

The issue has not yet been squarely presented in any case before the Supreme Court and has only been presented to one Circuit Court.

III

That the said Commissioner's assignments of error are as follows:

(1) That the Board erred in reversing the determination of the Commissioner that the attorney fee of $30,000.00 paid in 1924 is not deductible.

(2) That the Board erred in failing to hold that the attorney fee of $30,000.00 is not deductible as an ordinary and necessary expense paid during the taxable year 1924 in carrying on a trade or business.

[fol. 27] (3) That the Board erred in holding that the attorney fee of $30,000.00 is a deductible expense under the provisions of Section 214(a)(1) of the Revenue Act of 1924.

(4) That the Board erred in not holding that the attorney fee of $30,000.00 paid in 1924 is not deductible under the provisions of Section 215(a) of the Revenue Act of 1924.

(5) That the Board erred in entering a judgment against the Commissioner showing an overpayment of $10.33 in income tax for the year 1924.

Wherefore, the Commissioner petitions that the decision of the U. S. Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) Sewall Key, Special Assistant to the Attorney General. C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. E. Marshall, Special Attorney, Bureau of Internal Revenue.

[fol. 28] *Duly sworn to by C. M. Charest. Jurat omitted in printing.*

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Received April 20, 1933. Filed April 20, 1933

To Frederick R. Gibbs, Esq., 707 Munsey Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of April, 1933, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United Stafes Circuit Court of Appeals for the Fifth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of April, 1933.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assign-

[fol. 30] ments of errors mentioned therein, is hereby acknowledged this 20th day of April, 1933.

Catherine Llewellyn Van Wart by Roy M. Van Wart, Nat'l Tutor, Respondent on Review.
Frederick R. Gibbs, Attorney for Respondent on Review.

csl 4/19/33.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PRÆCIPE FOR RECORD—Received May 2, 1933. Filed May 2, 1933

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board. [fol. 31] 2. Pleadings before the Board: (a) Petition filed April 29, 1929, including annexed copy of deficiency letter. (b) Answer to petition filed June 14, 1929.

3. Stipulation of Facts filed with Board on November 7, 1932.

4. Memorandum opinion of the Board promulgated and entered December 5, 1932.

5. Order of "Judgment" entered by Board on January 28, 1933.

6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

7. Letter dated March 6, 1929, with statement attached, which was offered in evidence as Petitioner's Exhibit #1

and made a part of the record. For Petitioner's Exhibit No. 1 see 60 day letter attached to petition.

8. This præcipe.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Service of a copy of the within Præcipe is hereby admitted this 2nd day of May, 1933.

Frederick R. Gibbs, Attorney for Respondent on Review.

Cr/csl 4/19/33.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 6990

COMMISSIONER OF INTERNAL REVENUE

versus

CATHERINE LLEWELLYN VAN WART, by ROY M. VAN WART, Natural Tutor

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 27th, 1934

On this day this cause was called, and, after argument by Carlton Fox, Esq., Special Assistant to the Attorney General, for petitioner, and Frederick R. Gibbs, Esq., for respondent, was submitted to the Court.

[fol. 34] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6990

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

versus

CATHERINE LLEWELLYN VAN WART, by ROY M. VAN WART, Natural Tutor, Respondent

Petition for Review of Decision of U. S. Board of Tax Appeals (District of Louisiana)

(March 12, 1934)

Before Bryan, Foster and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed March 12th, 1934

BRYAN, Circuit Judge:

Catherine L. Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones,

deceased. Dr. Roy M. Van Wart, Catherine's father, with whom she resided in Orleans Parish, Louisiana, after being confirmed by order of the district court for that Parish in accordance with the laws of Louisiana as her natural tutor or guardian, and after duly qualifying as such, demanded of the trustees under the will that they pay over to him the [fol. 35] accrued income of the trust created in favor of his ward. The trustees, claiming among other things the right to keep possession of the accumulations of such income until Catherine should become of age, when they conceded she would be entitled to the corpus as well as all accumulated income, declined to comply with that demand. Thereupon suit was brought in the name of the minor, by her father as next friend, in the federal court for the district in West Virginia in which the testator was residing at the time of his death, against the trustees to compel distribution of the income involved in accordance with the guardian's previous demand. That suit finally was decided in favor of the plaintiff, it being held that the guardian was entitled to receive from the trustees his ward's accumulated income and future income as it annually accrued. Van Wart v. Jones, 295 F. 287. Accordingly, in 1924 the trustees paid over to Dr. Van Wart as guardian the accumulated income of $160,000 and current income of $80,000; and Dr. Van Wart, acting as guardian and by authority of the court of his appointment, paid out of the funds so received by him a fee of $30,000 to the attorneys who brought the suit for their services in the litigation. In the income tax return for 1924, which was filed by the guardian on behalf of his ward, a deduction of the attorneys' fee was claimed. The deduction, though disallowed by the Commissioner of Internal Revenue, was allowed by the Board of Tax Appeals. And the Commissioner filed a petition for review.

The Board held that the attorneys' fee paid by the guardian was deductible as an ordinary and necessary expense incurred in carrying on a trade or business within the meaning of § 214 (a) (1), Revenue Act of 1924. 26 U. S. C. A. § 955. Its opinion, which is unreported but appears in the record, is based on its decision in Wurts-Dundas v. Commissioner, 17 B. T. A. 881, and on several [fol. 36] of its other decisions therein cited to the same effect. The Wurts-Dundas case was affirmed by the Circuit

Court of Appeals for the Second Circuit. 54 F. (2) 515. It is the contention of the Commissioner that the attorneys' fee was a personal expense of the minor taxpayer, and was not deductible because in computing net income deduction of the taxpayer's personal expenses is prohibited by § 215 (a) (1) of the same Revenue Act. 26 U. S. C. A. § 956.

We are constrained to agree with the Commissioner that in allowing the deduction the Board erred. An allowable expense is deductible only from the income of the taxpayer. The taxpayer's expenses incurred in carrying on a business are deductible, but his personal expenses are not. As in this case the income belonged to the minor, the ward, and not to the guardian, she and not he was the taxpayer. The attorneys' fee was an expense of litigation which was paid out of her income. She was not engaged in any business, and therefore as to her the fee was not a business expense. If she had been of legal age and had brought the suit against the trustees of her grandfather's estate in her own right, the amount of the fee would have been a personal expense for which she would not have been entitled to any deduction from her income. Commissioner v. Field, 42 F. (2) 820; Walker v. Commissioner, 63 F. (2) 351. The fact that she was a minor makes no difference. In the matter of personal expenses, the income tax law makes no distinction between a minor and an adult taxpayer; it treats them both alike. They would be treated very differently under the rule announced by the Court in the Wurts-Dundas case, supra, and followed by the Board in this case. Under that rule, the cost of litigation could be deducted from the minor's personal expenses by incurring it at any time before he or she came of age, whereas, as we have seen, such cost could not be so deducted in the case of an adult tax-
[fol. 37] payer; or where there were two beneficiaries of taxable income, one a minor and the other an adult, the former would but the latter would not be entitled to deduct the same sort of personal expenses. To follow such a rule would be, as it seems to us, to recognize a difference in tax liability where none was intended or authorized by the income tax law.

But it is said the guardian was engaged in business, the business of being a guardian; and that the fee incurred and paid to the attorneys in the litigation with the trustees was a necessary expense not of the guardian but of the guard-

ianship, which is spoken of as a separate entity. Whether or not being a guardian is doing business, it is unnecessary to decide. The fee was not an expense of the guardian or guardianship; it was paid out of the ward's income. That income was taxable not to him but to her. Busch v. Commissioner, 50 F. (2) 800. We are not here concerned with the case of a trust estate of such character that the income derived therefrom is taxable to the fiduciary. This is not that kind of a case.

The petition for review is granted, and the cause remanded for further proceedings not inconsistent with this opinion.

[fol. 38] No. 6990

COMMISSIONER OF INTERNAL REVENUE

versus

CATHERINE LLEWELLYN VAN WART, by ROY M. VAN WART, Natural Tutor

JUDGMENT

Extract from the Minutes of March 12th, 1934

This cause came on to be heard on the petition of the Commissioner of Internal Revenue for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that said petition be, and the same is hereby, granted; and that this cause be, and it is hereby, remanded to the said United States Board of Tax Appeals for further proceedings not inconsistent with the opinion of this Court.

[fol. 39] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify

that the pages numbered from 33 to 38 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 6990, wherein the Commissioner of Internal Revenue is petitioner, and Catherine Llewellyn Van Wart, by Roy M. Van Wart, Natural Tutor, is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 32 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 30th day of April, A. D. 1934.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted: And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,723. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 95. Catherine Llewellyn Van Wart, by Roy M. Van Wart, Natural Tutor, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1934. File No. 38,723. 95, O. T., 1934.